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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF GAMEFLY, INC.	)	Docket No. C2009-1R

**RESPONSE OF GAMEFLY, INC.,
TO USPS MOTION FOR RECONSIDERATION
AND CLARIFICATION OF ORDER NO. 1763
(August 1, 2013)**

GameFly, Inc. ("GameFly") respectfully responds to the "Motion for Reconsideration and Clarification of Order No. 1763" filed by the Postal Service on July 25, 2013.

The first section of the July 25 motion, which seeks reconsideration of Order No. 1763, is merely a rehash of arguments that the Commission has already considered and rejected. The Postal Service provides no reason for a different outcome this time. Indeed, many of the Postal Service's arguments were rejected by the Commission in its *2011* final decision (Order No. 718), or by the Court of Appeals in *GameFly, Inc. v. PRC*, 704 F.3d 145 (D.C. Cir. 2013). Because the Postal Service failed to seek timely appellate review of those decisions, their adverse findings have preclusive effect, and are not open for reconsideration. The Postal Service's continued airing of these arguments is a further example of the abusive and wasteful litigation tactics that have undermined the legitimacy of the complaint process.

The second section of the July 25 motion, which seeks clarification of two issues raised by Order No. 1763, raises a legitimate question: would reducing the current rate

for flat-shaped DVD mailers trigger a recalculation of available CPI price cap authority, and thus require that the remainder of any currently unused authority be placed in the "CPI bank," which currently has a negative balance of 0.528 percent? For the reasons explained below, the Commission should clarify that the answer is no.

ARGUMENT

I. THE POSTAL SERVICE'S GROUNDS FOR RECONSIDERATION OF ORDER NO. 1763 ARE WITHOUT MERIT.

The Postal Service seeks reconsideration of Order No. 1763 on three grounds: (1) the January 2013 Court of Appeals remand authorized only an operational remedy; (2) even if the remand left the Commission with discretion to consider a pricing remedy, the Commission abused its discretion by adopting a pricing remedy instead of an operational remedy; and (3) even if the Commission could properly adopt a pricing remedy, the Commission erred in adopting the rate equalization remedy instead of some other (unspecified) pricing remedy. None of these grounds has merit. We discuss each in turn.

A. The January 2013 D.C. Circuit Decision Left The Commission With Discretion to Adopt Either An Operational or Pricing Remedy.

The Postal Service begins by asserting that the Court of Appeals' January 2013 decision "plainly contemplated a service-based (or operational) remedy," not a pricing remedy. Motion at 2-3. The Court of Appeals decision reveals no such intention: as the Commission correctly held in Order No. 1763, the Court of Appeals decision made clear that the Commission had discretion to adopt a pricing remedy on remand. Order No.

1763 at 28-29, 30-31 (explaining why the Postal Service was misinterpreting the court's decision).

As a general matter, the Commission, like its peers, has broad discretion in choosing a remedy in a complaint case. Order 718 at ¶¶ 5008-5011; Order 1763 at 34-35. The January 2013 decision of the Court of Appeals identified only three constraints on this discretion. First, the Commission, having "properly [found] that discrimination has occurred," is "obligated to remedy that discrimination . . ." *GameFly*, 704 F.3d at 149; *accord*, 39 U.S.C. § 3662(c). Second, the remedy adopted by the Commission must eliminate the discrimination completely unless the Commission provides a "reasonable explanation" for any "residual discrimination its order [leaves] in place." *Id*., 704 F.3d at 148, 149. Third, the Commission may not satisfy this requirement by invoking the cost and operational differences between letter- and flat-shaped DVD mailers, since GameFly's use of flat-shaped mailers resulted from "the Postal Service's terms of service discrimination against GameFly, not GameFly's free choice." *Id*. at 148-149.

The supposedly "plain" intent of the Court of Appeals decision to allow only an operational remedy (Motion at 2-3) seems plausible only if one ignores the two paragraphs of the Court of Appeals decision immediately preceding the snippet quoted by the Postal Service. The court's reference to "terms of service discrimination" (704 F.2d at 149) came in a rejoinder to the Commission's finding in Order No. 718 that differences between the costs and prices of letter vs. flat-shaped mail could justify residual discrimination in *price* between letter-shaped and flat-shaped DVD mailers. *GameFly*, 704 F.3d at 148-149 (quoting Order No. 718 at ¶¶ 5029-5030). This residual

difference in *price*, the court reasoned, could not be justified by GameFly's choice of mailpiece shape—not when that choice was compelled by the Postal Service's "terms of service discrimination." *GameFly*, 704 F.3d at 149. Any doubt that the court intended to leave open the option of a pricing remedy is dispelled by the court's observation that the Commission "will surely consider these remedies"—i.e., a pricing remedy and an operational remedy—on remand. 704 F.3d at 749; *accord*, Order No. 1763 at 28-29, 30-31.

Indeed, even the Postal Service has previously acknowledged that the Court of Appeals decision allows adoption of a pricing remedy. *See* USPS Reply (March 14, 2013) at 10- (asking the Commission to reaffirm its original pricing remedy rather than adopt an operational remedy); *id*. at 5-10 (describing the additional record evidence needed to support a different pricing remedy);. Only when the Commission adopted a pricing remedy not to the Postal Service's liking did it belatedly decide that the Court of Appeals had meant to foreclose pricing remedies all along.

The Postal Service's assertion that neither the D.C. Circuit remand order nor Title 39 authorized the Commission to consider the "effectiveness, enforceability, and avoidance of undue delay" of each possible remedy is frivolous. *Cf*. USPS Motion at 3 n. 5; *cf*. Order No. 1763 at 14-18 (explaining why the Commission used these three criteria). 39 U.S.C. § 3662(c) requires the Commission, upon finding that a complaint is justified, to take action needed to "achieve compliance with the law" and "remedy the effects of any noncompliance." *GameFly v. PRC*, 704 F.3d at 148-149, requires the Commission to eliminate the discrimination against GameFly or explain why this was infeasible. The effectiveness, enforceability and timeliness of a remedy are all attributes

of its sufficiency. Consideration of these criteria when choosing a remedy to prescribe under Section 3662(c) was clearly within the Commission's discretion under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842–43 (1984). Indeed, *not* considering these common sense criteria would have been arbitrary and capricious.

Finally, the Postal Service's attack on the pricing remedy as *insufficient* to protect GameFly is also frivolous. *See* Motion at 3 ("the Commission's Equalized Rate Remedy leaves in place the very service discrimination on which the D.C. Circuit's remand was based"). With all respect, the Postal Service has no right to speak for GameFly or any other victim of the Postal Service's discrimination on this issue. GameFly proposed the price equalization remedy, and considers it adequate. The Postal Service bitterly opposed the remedy as too restrictive. Now, having lost on the issue, the Postal Service has no standing to assert on behalf of GameFly that the remedy does not go far enough.

B. The Commission Had Ample Grounds For Not Adopting An Operational Remedy.

The Postal Service argues in the alternative that, even if the D.C. Circuit decision left the Commission with discretion to consider either a pricing or an operational remedy, the Commission's grounds for rejecting an operational remedy were arbitrary and capricious. Motion at 4-5. These arguments are also without merit.

The Commission properly found that an order requiring the Postal Service to give DVD rental companies Netflix-like levels of manual processing would be neither practical nor cost-effective. Order 1763 at 18-25; *cf*. Motion at 4. The Postal Service

made clear that it would not do so voluntarily; and the Commission had ample basis for finding that trying to compel the Postal Service to do so involuntarily would be impractical, overly intrusive, and excessively costly. See Order 718 at ¶¶ 4078, 4085; Order No. 1763 at 22-24; GameFly Response (May 13, 2013) at 9-15.

The Postal Service's offhand claim that enforcement of a manual processing requirement could easily be accomplished with barcode scan data (Motion at 4) is utterly at odds with the Postal Service's previous representations that an operational remedy would be impractical to monitor or enforce:

> Even if it were possible, as GameFly alleges, to use barcoding technology to document the frequency at which a customer's mail is passed through the automated processing equipment, that would not avoid the PRC's obligation under the proposed remedy to ensure that the Postal Service is following the eight components for manual processing [that Netflix receives] and reaching the minimum level of manual processing. . . . The record supports the PRC's decision that GameFly's proposed remedy would have been impractical and unduly burdensome.

USPS Brief in Docket No. 11-1179 (March 5, 2012) at 13; *accord*, Order No. 718 at ¶ 4135, 514-5016; *accord*, Brief for Respondent PRC in Docket No. 11-1179 (Feb. 17, 2012) at 36 (questioning how "information on the number of times mailpieces pass through *automated* processing equipment sheds light on the proportion of mailpieces processed *manually*," and "how barcode scan data would show whether the Postal Service employed the eight specific processing steps GameFly demanded be included as the required elements of [a] Commission-mandated remedy."); *see generally*, *id*. at 7-14; *accord*, USPS Reply in Opposition to Motion of GameFly, Inc., to Establish Standards and Procedures to Govern Proceedings on Remand 14-15 (March 14, 2013).

The Postal Service's assertion that the Commission also erred in rejecting the *opposite* remedy—i.e., forbidding the Postal Service from giving Netflix-like levels of manual processing to *any* customer, including Netflix—is an equally crude act of revisionism. *Cf.*, Motion at 4. The Postal Service engaged in four years of scorched earth litigation in an effort to preserve its freedom to give Netflix manual processing. Not once during this period did the Postal Service suggest that it would be willing to stop this practice. A litigant has no standing to challenge an agency's failure to award relief that the litigant did not seek. *Mail Order Ass'n of America v. USPS*, 2 F.3d 408, 432 (D.C. Cir. 1993) (citing *Mitchell v. Christopher*, 996 F.2d 375, 378 (D.C. Cir. 1993); *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 680 (D.C. Cir. 1983)). The record provides ample support for the Commission's finding that trying to enforce a ban on so deep-rooted and pervasive an operating practice would be neither practical nor cost-effective. *See* Order No. 1763 at 18-20, 21-25 (discussing record).

The notion that the Commission erred in declining to reopen the record to consider a recent decline in the volume of DVD mail (Motion at 4 n. 6) is equally wide of the mark. Reopening the record of a case is an extraordinary remedy, and the Postal Service has failed to satisfy the requirements for doing so: (1) identifying the changes with particularity; (2) presenting specific evidence of the changes to the agency; and (3) demonstrating that the changed circumstances were not the result of unwarranted delaying tactics. Order No. 1763 at 24-25; GameFly Response (May 13, 2013) at 23-27. These omissions are especially serious when, as here, reopening would inflict further irreparable injury on an adverse party. *Id*.

Finally, the Postal Service tries to resurrect a trio of objections that the Commission rejected in its *2011* decision: (1) that the Postal Service has no duty to "take steps to limit damage to customer's mail" (Motion at 4-5); (2) that "damaged mail cannot be the basis for a legal claim against the Postal Service" (id. at 5 n. 7); and (3) that any DVD breakage suffered by GameFly is its own fault for failing to take the same "steps to protect its own" DVDs that Netflix did (*id*. at 5). The Commission properly rejected these arguments in Order No. 718. While the Postal Service can choose to protect DVDs from damage or not, whatever level of protection it provides must be provided in a nondiscriminatory fashion. Order No. 718 at ¶¶ 4132-4139, 5003; *accord*, Order 1763 at 23 and 24 n. 21. While disk breakage does not give rise to a tort cause of action under the Tort Claims Act, discriminatory levels of exposure to disk breakage do give rise to a complaint under 39 U.S.C. § 3662 for undue discrimination under 39 U.S.C. § 403(c). Order No. 718 at ¶¶ 4009-4010; GameFly Reply Post-Hearing Brief (November 18, 2010) at 8-10. And the notion that GameFly's grievance against the Postal Service results from GameFly's improvidence, not the Postal Service's unlawful discrimination, is refuted by the record. Order No. 718 at ¶¶ 4096-4103. As the Commission has recognized, the Postal Service's failure to seek timely judicial review of these adverse findings precludes relitigation of those issues as a matter of issue preclusion. Order No. 1763 at 17 & n. 17; *accord*, Response of GameFly (March 18, 2013) at 4-6 (citing precedent).

C. The Commission's Properly Adopted Rate Equalization Rather Than Some Other Pricing Remedy.

The Postal Service's criticisms of the Commission's decision to adopt rate equalization rather than another pricing remedy are equally without merit. The

Commission's decision to "disregard" the cost and pricing differences between letter- and flat-shaped mail in prescribing rate equalization was hardly arbitrary. *Cf*. Motion at 6. The Commission disregarded those differences because the Court of Appeals ordered the Commission to do so. Order 1763 at 30-31; *accord*, 704 F.3d at 148-149; GameFly Motion (March 7, 2013) at 9-11.

The notion that the Commission, by prescribing rate equalization, failed to consider the objectives and factors of § 3622(b) and (c) is also without substance. *Compare* Motion at 6-7 and Order 1763 at 17-18, 31-32. Although 39 U.S.C. § 3622(b) and (c) and other provisions of Title 39 indeed give the Postal Service broad pricing flexibility, Section 403(c) requires the Postal Service to exercise this flexibility in a manner that does not discriminate unreasonably between similarly situated mailers, and Section 3662(c) gives the Commission broad authority to prescribe rate adjustments—and to override the Postal Service's pricing flexibility—to the extent necessary to remedy unlawful discrimination.

These propositions are not novel or disputed. The relationship between the nondiscrimination obligation of a regulated common carrier or utility, and the regulatee's right to exercise its pricing flexibility, has been settled for a century: the regulatee is entitled to set its rates anywhere within the zone of maximum and minimum rate reasonableness established by the statute, but the resulting rates (and terms of service) must be offered to all similarly situated ratepayers without undue discrimination. *See Texas & P. Ry. Co. v. United States*, 289 U.S. 627, 650 (1933)); *American Express Co. v. State of South Dakota*, 244 U.S. 617, 624 (1917). The authority of federal regulatory commissions to prescribe rate adjustments—and to override the otherwise-broad pricing

flexibility of the regulated carrier or utility—to enforce statutory prohibitions against undue discrimination under similar remedial statutes has likewise been recognized for nearly a century. *See*, *e.g*., *ICC v. Ill. Cent. R. Co*., 263 U.S. 515, 521 (1924); *ICC v. United States ex rel. Campbell*, 289 U.S. 385, 392 (1933); *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 23-24 (2d Cir. 1978) (the FCC, having found the existence of undue discrimination, need not conduct exhaustive financial or cost studies before prescribing relief); *see also Suncor Energy Marketing Co., Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242 at P 137 (2010) (ordering pipeline to implement a proration policy proposed by shippers to remedy concerns about discrimination raised in complaints and protests brought under the Interstate Commerce Act).

Nothing in the Postal Accountability and Enhancement Act of 2006 ("PAEA") warrants a different result. None of the pricing provisions added to 39 U.S.C. § 3622 (or any other sections of Title 39) by PAEA even mention discrimination, let alone purport to override, modify or restrict Section 403(c). *That* subject is specifically governed by Section 403(c), which has remained unchanged in Title 39 for more than 30 years. Moreover, even if (contrary to fact) the provisions of Sections 3622 could somehow be construed to conflict with Section 403(c), the latter would trump the former, as the Commission recognized in Docket No. RM2009-3, *Consideration of Workshare Discount Rate Design*, Order No. 536 (Sept. 14, 2010) at 16-17.[1]

[1] This result is also warranted by the rule of statutory construction that gives specific statutory provisions priority over general provisions. Section 403(c) deals specifically with undue discrimination; the provisions of section 3622 are more general in scope. To read them as implicitly repealing or restricting Section 403(c) would violate the basic rule of construction that "the specific governs the general," particularly where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct.

Under the circumstances, the Commission's decision in Order No. 1763 gave ample deference to the Postal Service's right of pricing flexibility under 39 U.S.C. § 3622 by allowing the Postal Service to equal rates for letter- and flat-shaped rates at a point to be chosen by the Postal Service, not the Commission. *See* GameFly Motion (March 7, 2013) at 14-15. In any event, the Postal Service never identified what alternative pricing remedy would better satisfy 39 U.S.C. § 3622(b) and (c), while still complying with § 403(c).

Finally, the Postal Service's speculation that rate equalization could lead to undue discrimination against *other* mail matter that is currently mailed as flats (Motion at 7) deserves no further consideration. The Postal Service has asserted this objection several times before; GameFly has explained each time why content-based pricing in these circumstances does not violate Section 403(c); and the Postal Service has never responded. GameFly Response (March 18, 2013) 8, 11-12; GameFly Response (May 13, 2013) at 20-21.

2065, 2070-72 (2012) (citations omitted). Moreover, "[w]hile a later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision . . . 'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2532 (2007) (citations omitted). No such intention appears in the text or legislative history of PAEA.

II. THE COMMISSION SHOULD CLARIFY THE ASPECTS OF ORDER NO. 1763 NOTED BY THE POSTAL SERVICE.

The Postal Service's requests for clarification, unlike its requests for reconsideration, are not entirely unreasonable. We discuss each issue raised by the Postal Service in turn.

A. Adoption Of A Market-Dominant 46 Cent Rate For Flat-Shaped DVD Mailers Should Not Require The Postal Service To Apply The Negative Balance In The CPI Cap.

On pages 7-10 of its pleading, the Postal Service expresses concern that reducing its current rate for flat-shaped DVD mailers, a market-dominant product, to 46 cents (less workshare discounts) might trigger a recalculation of available CPI price cap authority and require that any newly-generated unused authority be placed in the "CPI bank," which currently has a negative balance of 0.528 percent. Motion at 7-10. The Commission should clarify that no such recalculation will be required.

The Commission has repeatedly excluded temporary promotions and other narrowly-focused discounts from the calculation of percentage changes in rates. Order No. 1786 in Docket No. RM2013-2, *Review of the Commission's Price Cap Rules* (July 23, 2013) at 29. Most recently, the Commission followed the same approach for the Technology Credit Promotion. Order No. 1743 in Docket No. R2013-6, *Notice of Price Adjustment (Technology Credit Promotion)* (June 10, 2013) at 17. Consistent with this general practice, the Commission also did not require a recalculation of the CPI price cap authority when the Postal Service eliminated the second-ounce charge for flat-shaped DVD mailers in compliance with Order No. 718 in 2011.

On July 23, the Commission announced that it is opening a proceeding to consider generally the appropriate treatment of promotional discounts. Order No. 1786 at 28-33. The future proceeding presumably will consider, among other items, the appropriate prospective treatment of Commission-imposed price reductions like the one at issue here. The Postal Service should not be penalized for implementing a Commission-prescribed price reduction on a narrowly defined product while this aspect of the price cap rules remains unresolved. No significant countervailing policy warrants a departure from past practice for the September 30 rate change.

B. The Remedial Order Should Apply To All Postal Service Customers That Send And Receive Round-Trip DVD Mailers.

The Postal Service also asks whether the 46 cent rate for flat-shaped DVD mailers that the Postal Service has published to take effect on September 30 should be available to other customers that use round-trip DVD mailers, or just to GameFly. Motion at 10-11. As the record makes clear, DVD breakage in automated letter processing is an industry-wide problem. GameFly Post-Hearing Brief (Nov. 8, 2010) at 100-18 (discussing record). Accordingly, the remedy prescribed by the Commission in Order No. 1763 should be made available to all senders of round-trip DVD mailers who can satisfy the preparation requirements prescribed by the Commission. To exclude smaller DVD rental companies from the remedy would reestablish the very kind of discrimination that GameFly complained against.[2]

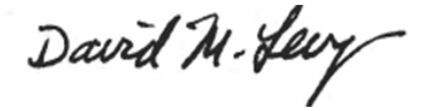
[2] The Postal Service does not state what volume of DVD mail is entered by mailers smaller than GameFly. To the best of GameFly's knowledge, this volume is likely to be relatively small.

Finally, the Commission should clarify that all DVD mailers, including Netflix, must mail their DVDs at the round-trip DVD rate. The issue arises because DVDs can currently qualify for generic First-Class letter rates as well as for the specialized rates established for round-trip First-Class DVDs. Under the rates scheduled to take effect on September 30, the difference in classification will make no difference because both sets of letter rates, as well as the rate for flat-shaped round trip DVDs, will all equal 46 cents on September 30. In the future, however, the Postal Service could use the availability of the generic First-Class letter rate as a back-door way to preserve discrimination in favor of Netflix—by keeping the prices for both letter-shaped and flat-shaped round-trip DVD mailers equal to *each other*, but higher than generic First- Class letter rates. By quietly allowing Netflix to use the latter rate, and continuing to provide Netflix with manual handling, the Postal Service would allow Netflix to mail DVDs at a lower rate than GameFly and other DVD rental companies. GameFly, without access to the same level of manual processing, would be relegated to the higher rate created specifically for DVDs. The discrimination would be back in full force.

CONCLUSION

The Commission should reaffirm Order No. 1763, while clarifying the points noted above.

Respectfully submitted,



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